Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-1860

ELIJAH EPHRAIM JHIRAD,

Petitioner,

vs.

THOMAS E. FERRANDINA, United States Marshal Southern District of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, while serving as Judge Advocate General of the Indian Navy, was charged by the Government of India with the responsibility of disbursing a certain Naval Prize Fund. The Government, not being able to audit the fund due to the destruction of the records at petitioner's behest in 1962, instituted an investigation. During the pendency of the investigation of which he was aware, petitioner prepared to leave India by disposing of his law books and other personal possessions. He also arranged for his law practice to be handled

by a junior associate. In conjunction with the investigation the Central Bureau of Investigation (CBI) had served a notice on the Central Bank of India to turn over copies of accounts relating to the Naval Prize Fund. Thereafter petitioner contacted a Mr. K. B. Mathur at the bank to discuss matters concerning his personal account. At this time petitioner was advised by Mr. Mathur that the bank had been requested by the CBI to turn over their records. Petitioner subsequently left India, never to return. Such behavior is incompatible with the image he has sought to present in the proceedings below, *i.e.*, an eminent attorney being subjected to harassment for his political beliefs. Petitioner at the time of his departure from India was still officially a member of the Naval Service, having been on half-pay leave of absence from December 1, 1964 to November 30, 1965. After the expiration of leave, he never returned to his official duties.

The fund charged to petitioner's trust amounted to $400,000, a not insignificant sum and for which no accounting or audit was made. The Government's interest in bringing petitioner to justice should not be minimized solely because the court below has held that individual acts of embezzlement which comprised petitioner's unlawful course of conduct with respect to the fund were in large part time-barred. The record established the implementation of petitioner's scheme for the period February 14, 1959 to December 5, 1961, culminating in the destruction of the records and subsequent flight abroad. This kind of corruption involving highly placed government officials is a particular outrage and it is the duty of any government to pursue this socially debilitating type of crime. Petitioner's position of authority and trust serves only to heighten the severity of the allegations and should not be used by him as a shield. Notwithstanding the amount involved, the Government had no choice but to bring to account officials who have abused their public trust.

REASONS FOR DENYING THE WRIT

I.

The magistrate had jurisdiction to conduct the initial evidentiary hearing and the remanded hearing required by 18 U.S.C. §3184.

The magistrate is empowered by the extradition statute, 18 U.S.C. §3184 to hear all evidence pertaining to an extradition proceeding. Elementary rules of statutory construction require that a specific statutory mandate take precedence over a general rule. 28 U.S.C. §2243 applies generally to habeas corpus proceedings, the majority of which arise from federal or state criminal prosecutions. The law of international extradition, however, is a specialized area engrafted through statutes and treaties upon the general body of criminal law. Such proceedings are essentially an expression of comity between sovereign nations and are thus only remotely connected to the internal law of the country responding to the extradition request. *Factor v. Laubenheimer,* 290 U.S. 276 (1933) at p. 298.

Petitioner's effort to inject into the proceedings the entire body of American jurisprudence concerning habeas corpus ignores the unique nature of an international extradition. As the Court of Appeals noted, this imposition of a bifurcated structure upon extradition proceedings, one for the initial hearing and a second procedure for appellate review, is "supported neither by logic nor law." (Appendix, 104a).

A further consideration is that the judiciary's role in international extradition has been narrowly defined both by treaty and statute. It would therefore be improper to alter the nature of these proceedings by imposing a complex bifurcated structure, in the face of the legitimate exercise of the executive treaty power and its concurrent support by Congress through legislation. *Terlinden v. Ames,* 184 U.S. 270 (1901) at p. 290.

II.

Petitioner was given ample notice of the issues involved in determining whether he possessed the requisite intent to flee.

Petitioner in Points I, III and IV of his petition for a writ of certiorari has misrepresented and confused several issues. While there is a conflict among the circuits as to the requirement of intent in order to toll the running of the statute of limitations, this issue was decided squarely in petitioner's favor by the Second Circuit when in *Jhirad I* it held that absence alone was not sufficient to prevent the statute from running. Petitioner cannot now claim that the Second Circuit by accepting the magistrate's explicit findings of the requisite intent reversed itself.

Secondly, the magistrate's finding as to petitioner's intent was a finding of fact which the Second Circuit in *Jhirad II* determined was amply supported in the record. The magistrate, perhaps ill-advisedly, used the legalistic phrase "constructive flight" to describe the facts of the case. The magistrate did, however, find a generalized intent to flee which was formalized after the petitioner left India. The evidence which enabled the magistrate to determine petitioner's intent was necessarily of a continuing nature; extending backward in time to the initiation of the investigation and forward to his movements after leaving India. In every case where flight is an issue the defendant has ample notice that his movements before and after leaving a jurisdiction will form the basis of the fact-finder's opinion. The words "constructive flight" are not the beginnings of a new legal doctrine but a shorthand method of description used by the finder of fact in this case.

The rights of the petitioner have been assiduously protected by the courts and he has had every opportunity to properly prepare for his defense to these proceedings.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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